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December 17, 2020

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The Hon. Jan E. DuBois
United States District Court
Eastern District of Pennsylvania
Room 12613, Ctrm. 12-B
601 Market Street
Philadelphia, CA 19106

Re: *In re Niaspan Antitrust Litigation - MDL No. 13-2460*
Time-Sensitive Request

Dear Judge DuBois:

I write on behalf of Defendants to request an expedited teleconference to address an issue that the End Payor Plaintiffs have raised at the last minute with respect to their renewed class certification motion reply papers due this Friday, December 18, 2020.

As the Court will recall, the scheduling order governing EPPs' renewed motion for class certification does not permit reply expert reports with the EPPs' reply brief that is due today. Docket No. 716, ¶ 4 (Ex. A hereto). This issue was specifically discussed at the teleconference that led to the scheduling order. Transcript of Telephonic Scheduling Conference of 8-11-2020, at 38:17-18, 39:8-13 (Ex. B hereto).

Nonetheless, just Wednesday of this week (December 16, 2020), EPPs first stated that in light of Defendants' opposition to their renewed motion for class certification and an accompanying expert report – filed and served **six weeks ago** on November 6, 2020, EPPs

planned to file a reply expert report, and sought Defendants' concurrence. (Ex. C hereto, at initial [bottom] email in chain.) That same day Defendants set forth their objection. (Ex. C at Correspondence from Stuart N. Senator attached thereto, at 4.) We refer the Court to the correspondence from the undersigned that is attached to Ex. C for a complete statement of the bases for Defendants' objection.

Exhibit C also made an important procedural request – that, especially in light of the Court's prior consideration and rejection of reply expert reports, EPPs seek and obtain the Court's permission before lodging any proposed reply report or otherwise smuggling such a report into the record. Defendants requested that, if EPPs planned otherwise, "please tell us immediately and we will present the issue to Judge DuBois tomorrow [Thursday, December 17, 2020]." *Id.*

EPPs said nothing that night or through most of today (Thursday). EPPs responded only after further prompting from Defendants' counsel this afternoon. (Ex. D hereto.) EPPs' 4:30 pm Eastern Time response was that they did plan to lodge the proposed reply report with the Court, presumably concurrently with their renewed class certification reply brief on Friday. (Exhibit C hereto, at most recent [top] email in chain, time stamped 1:30 pm Pacific Time.) By the time EPPs sent that response, however, it was too late for Defendants to raise the issue with the Court during the Court's business hours on Thursday.

Defendants object to this entire course of conduct. It appears to have been timed to make it as logistically difficult as possible for the Court to consider the issue of whether to allow the reply expert report (contrary to the Court's prior order) prior to EPPs' preparing and putting that report before the Court. Defendants would then be left with the hollow potential remedy of trying to unring the proverbial bell.

This letter is being filed on Thursday night (December 17, 2020). With apologies for burdening the Court on short notice, but with the justification that this is an emergency entirely of EPPs' making, Defendants request that the Court consider holding a telephone conference on this issue on Friday (December 18, 2020) or issuing an order that no reply expert report be filed, lodged or otherwise placed before the Court until after the Court considers this issue in a more orderly fashion.

Very truly yours,

Stuart N. Senator

SNS:flr

cc: All Counsel of Record (via ECF)

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: **NIASPAN ANTITRUST LITIGATION**	**MDL NO. 2460**
THIS DOCUMENT RELATES TO: **ALL ACTIONS**	**MASTER FILE NO. 13-MD-2460**

O R D E R

AND NOW, this 12th day of August, 2020, upon consideration of proposed schedules submitted by the parties on June 16, 2020 (Document Nos. 711, 712, 713), following a telephone scheduling conference with the parties, through counsel, on the record on August 11, 2020, **IT IS ORDERED** as follows:

1. On or before August 25, 2020, End-Payor Plaintiffs shall serve supplemental expert reports;

2. On or before September 5, 2020, End-Payor Plaintiffs shall file and serve an amended motion for class certification not to exceed twenty five (25) pages in length;

3. On or before November 6, 2020, defendants shall:

   a. Complete depositions of End-Payor Plaintiffs' expert witnesses and serve defendants' expert reports;

   b. File and serve *Daubert* motion(s) and a response to End-Payor Plaintiffs' amended motion for class certification, not to exceed a total of forty (40) pages in length.

4. On or before December 18, 2020, End-Payor Plaintiffs shall file and serve *Daubert* motion(s) and response(s) to defendants' *Daubert* motion(s), and are granted leave to file and serve a reply in further support of their amended motion for class certification, not to exceed a total of thirty (30) pages in length;

5. On or before January 11, 2021, defendants shall file and serve response(s) to End-

Payor Plaintiffs' *Daubert* motion(s) and are granted leave to file and serve a reply in further support of their *Daubert* motion(s), not to exceed a total of fifteen (15) pages in length;

6. On or before January 21, 2021, End-Payor Plaintiffs are granted leave to file and serve a reply in further support of their *Daubert* motion(s) not to exceed ten (10) pages in length.

IT IS FURTHER ORDERED that, on or before September 12, 2020, counsel shall jointly report to the Court with respect to whether the case is settled. In the event the case is not settled on or before September 12, 2020, counsel shall include in their joint report a statement as to whether they believe settlement conferencing before a magistrate judge or some other form of alternative dispute resolution might be of assistance in resolving the case and, if so, on what form of alternative dispute resolution they agree and by what date they will be prepared to begin such proceedings. If the parties agree on alternative dispute resolution and deem it appropriate to suspend further proceedings under the scheduling order until the question of settlement is fully explored, they should request a vacatur of the scheduling order in their joint report.

IT IS FURTHER ORDED that the Court will schedule summary judgment briefing and all other proceedings after ruling on End-Payor Plaintiffs' amended motion for class certification.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	Case No. 2:13-md-02460
NIASPAN ANTITRUST LITIGATION	U.S. Courthouse 601 Market Street Philadelphia, PA 19106
	August 11, 2020 3:17 p.m.

TRANSCRIPT OF TELEPHONIC SCHEDULING CONFERENCE
BEFORE THE HONORABLE JAN E. DUBOIS
UNITED STATES DISTRICT COURT JUDGE

TELEPHONIC APPEARANCES:

For the End-Payor Putative Class:	Wexler Wallace, LLP By: KEN WEXLER, ESQ. JUSTIN N. BOLEY, ESQ. 55 West Monroe Street Suite 3300 Chicago, IL 60603 (312) 346-2222
For Walgreen Plaintiffs:	Kenny Nachwalter P.A. By: SCOTT E. PERWIN, ESQ. One Congress Plaza 111 Congress Avenue, Suite 1060 Austin, TX 78701 (305) 373-1000
For the Direct Purchaser Putative	Berger Montague, P.C. By: DAVID F. SORENSEN, ESQ. 1818 Market Street, Suite 3600 Philadelphia, PA 19103 (215) 875-3000

TELEPHONIC APPEARANCES CONTINUED.

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(Proceedings commence at 3:17 p.m.)

THE COURT: We're going to conduct a scheduling conference today in the Niaspan Antitrust Litigation, MDL Number 13-2460.

The telephone conference is being recorded. We have an electronic sound recording operator on the line. I've got the attendance list. I don't think we're going to need to talk to very many of you. The issues really involve the end-payor purchasers, the defendants, and to a certain extent, direct purchaser plaintiffs.

As I see it, there are four issues that we have to address. The first is the sequencing of the filing of an amended motion for class certification, which the end-payor plaintiffs are contemplating, and the filing of motions for summary judgment, the first issue.

The second issue is the need for discovery, and specifically expert testimony, which means expert reports in connection with the filing of end-payor plaintiffs' amended motion. The third issue is page limits, and the fourth issue is the schedule.

Are there any other issues that anyone thinks we ought to address very briefly?

I hear nothing, so we will proceed. So the first issue is summary judgment versus class certification. Should we proceed simultaneously or not? I've read your submissions

and my inclination is to adopt defendants' position, and that is to go through whatever motion practice is required with respect to end-payor plaintiffs and defer the filing of any motion for summary judgment. I base that preliminary decision primarily on the fact that I think a defense summary judgment motion, with respect to end-payor plaintiffs, would depend to a large extent on what end-payor plaintiffs do regarding the class, and specifically the class definition.

I don't have a copy of my opinion denying the initial motion for class certification, but my -- I have a recollection of the issues. And, quite frankly, I think the end-payor plaintiffs face a very, very difficult task, and that specifically I think whatever they do will impact the way in which the defendants approach the issue of summary judgment as to their claims.

Now, that's my preliminary view. Do the end-payor plaintiffs or direct purchasers want to say anything on that issue? End-payor plaintiffs first. That's you, Mr. Kodroff.

MR. KODROFF: Thank you, Your Honor. This is Jeffrey Kodroff. I think Mr. Wexler, my co-counsel, will be handling this issue.

THE COURT: All right. Mr. Wexler?

MR. WEXLER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WEXLER: Good afternoon. You mentioned the class

definition. The amended motion we intend to file eliminates consumers from the class definition, which in our view --

THE COURT: I'm sorry, say that again, please. I missed that.

MR. WEXLER: I'm sorry. Let me make myself more hearable. The amended motion -- is this better?

THE COURT: Yes.

MR. WEXLER: The amended motion that we plan to file eliminates consumers from the class definition, which, when -- in reading your decision carefully, it does eliminate most of your concerns about certifying the class. It's our view that the -- in terms of the heavy burden that Your Honor said that we have, the third party making the case that the class consists solely of third-party payors really streamlines the issues. And our intention is to file a motion that does not retread old ground, but simply addresses the road map that you laid out in your opinion regarding what your concerns are and whether or not we can ameliorate them.

So in our view, it's not going to be as complex as the initial motion, which, as Your Honor knows, took a great deal of briefing and two hearings. The defendants want to limit us to 25 pages, at least our opening brief. We think we can do that easily. The expert reports we intend to submit with it are limited to those issues that Your Honor raised as concerns.

This is not something that we think requires a sequencing of briefing, but obviously it's up to Your Honor. We think both can proceed simultaneously, both summary judgment and our class motion, because our class motion is not that complex. Plus the only thing that the defendants were able to articulate how it might affect their briefing on summary judgment has nothing to do with the merits. The merits are going to be the same whether it's end-payors or direct purchasers, whether there is or is not a class. It's an antitrust case, so the elements are going to be the same.

Having said that, it's obviously in Your Honor's purview to do sequencing. But if, as the defendants point out, the only issue that would -- that they might address differently on summary judgment is whether we have a class-wide damages model that, assuming Your Honor denies our reviewed motion, that we want to use that damages model for individual damages. And that's such a discrete issue in the life of this case, and given the complexity of the merits, that that is something that could be briefed -- assuming the hypothetical comes true -- separately from summary judgment on the merits.

That's our view. I'm happy to answer any questions that you have.

THE COURT: No. I have no questions. But I'll hear from the defense on this issue.

Are you going to speak, Mr. Senator, or someone else?

MS. ALLON: Your Honor, this is Devora Allon for TEVA. I'll be speaking for the defendants.

THE COURT: All right. Yes, you may go ahead.

MS. ALLON: So as Your Honor noted, our summary judgment brief will depend in large part on whose claims we are addressing, and there will be a material difference in our briefing and the arguments we make if we're moving against the EPPs as a class or if we're proceeding against individual EPPs who are litigating as opt-outs if the class isn't certified.

You know, Mr. Wexler says it's just about damages. It's not just about damages. It's about the theory of injury. The evidence the EPPs use as a class, the average evidence they use, presumably they would not be using if they were litigating individually. They would have an entirely different damages model, our arguments would be different, and it would be unfair for us if we had to brief every possible summary judgment argument now, and it's inefficient to go through this exercise twice.

There's a second point I'd like to make, which is we certainly appreciate the desire of all the parties to move this case along, and we share that same desire. But summary judgment in any event cannot be accelerated before a decision on EPP class certification because you have an issue with class notice. And that issue is that summary judgment is not binding on absent class members until the class notice expires.

So if the Court rules on summary judgment before issuing a decision on class certification, or before notice has gone out, or before the notice period has expired, the summary judgment decisions will not bind anyone except for the named plaintiff. And that will create a substantial prejudice to the defendants because it allows absent class members to decide whether to join the class after they have the benefit of seeing the results of summary judgment.

And so for both of these reasons, we think it would inefficient and prejudicial to the defendants to proceed with summary judgment simultaneously with the briefing on an amended motion for class verification.

We have proposed a very consolidated schedule for the briefing on the motion -- renewed motion for class certification. We believe it can be done quickly without a lot of delay, but we think it makes the most sense to wait for summary judgment until we have the Court's decision on that motion because it will govern which arguments we make and against which counter-parties.

THE COURT: How will the contemplated difference in class definition impact defendants' motion for summary judgment, if at all?

MS. ALLON: Well, Your Honor, it does to the extent that we'll be making arguments about the damages model, which we will, and obviously, not knowing are we moving against the

original class definition, are we moving against the revised class definition that excludes consumers, or are we moving against individual EPPs as opt-outs? That is three different scenarios that will lead to three different sets of summary judgment arguments.

THE COURT: All right. I've heard argument on this issue and --

MR. SORENSON: Your Honor --

THE COURT: -- I would make --

MR. SORENSON: I'm sorry. I'm sorry, Your Honor. This is David Sorenson for the direct purchaser class plaintiffs. May I be heard briefly?

THE COURT: Yes, Mr. Sorenson.

MR. SORENSON: I just want to add, as we set out in our submission, we do think that briefing should proceed simultaneously. Putting aside the issue of when the decisions issue briefing on EPP renewed class and summary judgment, we think can go forward simultaneously, and the principal benefit is to cut down on delay and move this case along.

Listening to defense counsel in terms of what -- why does it matter to them in terms of summary judgment, it wasn't clear to me that it -- that -- I just wasn't clear on what they were saying in terms of how much it matters. They're being told that the EPP class definition is eliminating consumers. They can accept that and move on summary judgment with a --

against a class that does not have consumers. If it turns out that Your Honor does not certify the class and then there is later proceedings with individual third-party payors, that can be dealt with later. I don't think it will require all that much, and meanwhile the case is moving along.

In terms of the point about a notice and decisions, there is no fixed rule that summary judgment comes before or after class certification. Indeed, Judge Goldberg in the Provigil case -- I went back and looked at this -- he decided two sets of summary judgment motions in that case before deciding the direct purchaser class motion.

So it's -- I understand this argument, but it's not as if there is any fixed rule about it. And, principally, we're just concerned about moving the case. And I point out that, you know, whenever you rule on a renewed EPP class motion, my expectation is that there will be a 23(f) petition filed potentially by either side, and once that's filed, it wouldn't shock me if one side or the other then seeks to stay proceedings before Your Honor while that wends its way through the Third Circuit. Unless, you know, Counsel are prepared now to disclaim any such intent or desire to slow things down on a 23(f), that's what we're going to face.

And so just in the interest of moving the case along, again putting aside exactly when the decisions on summary judgment and EPP class are issued and what sequence, we believe

that briefings should go forward. So that's our view.

THE COURT: Thank you, Mr. Sorenson.

Does anyone else wish to add anything on this issue?

MR. PERWIN: Your Honor, just very briefly. This is Scott Perwin for the Walgreen plaintiffs. We agree with Mr. Sorenson. It looks like the sequencing the defendants are asking for is going to cause a significant delay in the progression of the rest of the case, which is going to go forward obviously regardless of what happens to the EPP class. And so we just think it makes more sense to go forward on parallel tracks, putting aside the question of the sequence of decisions, which is up to Your Honor.

THE COURT: All right. Well, and you don't have to repeat. No one else who has not spoken has to repeat what's already been said. I remain of the view that the end-payor plaintiffs' motion -- amended motion for class certification should proceed forward and we should defer any action on a motion for summary judgment. So we'll proceed in that way.

That raises the second question, and the second question is that of limited discovery. Quite frankly, I didn't see how -- I can recall -- I think it was you, Mr. Kodroff, who kept saying during trial that we've created a record here that will enable the Court to grant our initial motion for summary judgment, no issues. We've read all the other cases, the cases in which similar motions have been denied. We plugged all the

loopholes in here and we think we're strong. And that turned out to be dramatically not so in my judgment. And I, quite frankly, wouldn't see how you would be able to restructure the case in such a way as to come out with an amended motion that would work.

And I haven't thought through completely, maybe because I don't have an opinion in front of me, but I haven't thought through the way in which the revised class definition to proceed only with a class of third-party payors and to eliminate consumers from claims. I haven't thought through how that will play out regarding the issues raised in my opinion. But I'm sure you're not in this wasting time, and hopefully it will -- I'm going to use the term "shorten dramatically" the time it takes between the filing of the amended motion and a decision.

But I want to know what additional discovery you think you need, and explain why, why it wasn't done initially and what specific discovery that you need.

MR. WEXLER: Your Honor, this is Ken Wexler. I'll address that. We're not seeking other discovery. What we're seeking to do is submit declarations that address specifically the points that you raise in your opinion.

THE COURT: And you don't think that --

MR. WEXLER: So, for example --

THE COURT: And you don't think that's discovery,

Mr. Wexler?

MR. WEXLER: No. It -- we would certainly produce it with our -- as part of -- I mean, it does entail discovery, of course, because the defendants are going to want to depose the declarant, I understand that, and they may want to submit something in opposition. But given the guidance that your opinion gave with regarding the facts and the law applicable to the facts, given the recent Suboxone decision out of the Third Circuit, and given the fact that you told us where we had our problems, we think we can, in a very tailored fashion, meet your concerns.

It's -- I'll give you the examples. Laura Craft from OnPoint Analytics would provide a declaration that will address the Court's concerns regarding the method for applying certain exclusions to the revised class definition. Your Honor was very troubled by the lack of app -- you know, a methodology for applying the exclusions to the class definition. But there were six exclusions, but only two of which relate to third-party payors, self-funded government plans, and fully-insured plans. She will provide the methodology and provide the process by which the methodology will be applied in this case, which are the --

THE COURT: Can you --

MR. WEXLER: -- matters that concerned you.

THE COURT: You think with respect to the federal

claims, for example, and notwithstanding --

MR. WEXLER: That -- yes, yes.

THE COURT: Okay. And notwithstanding the examples provided by defendant -- I think there are one or two examples --

MR. WEXLER: Yes.

THE COURT: -- in evidence.

MR. WEXLER: Yes.

THE COURT: She'll be able to come up.

MR. WEXLER: Yeah, because she's already --

THE COURT: (Audio interference).

MR. WEXLER: Yes. That work has been done already, yes. And then Eric Miller, who provided a declaration before, he's from a notice firm A.B. Data. Your Honor expressed concerns about ascertainably facilitating the best notice practicable. With a third-party payor-only class as opposed to third-party payors and consumers, with respect to third-party payors, they receive direct notice in these cases. So the ascertainability issue insofar as facilitating the best notice practicable, he'll put on evidence that they will receive the best notice practicable, which is direct notice.

And then you expressed an issue regarding our use of averages and said that the -- you know, you distinguished the Flonase case because a sensitivity analysis was performed there. Well, we have had that done. Even though you found

that there was a de minimis number of uninjured third-party payors, we still have had the sensitivity analysis done to satisfy Your Honor, to more than satisfy Your Honor that we don't have -- and particularly with respect to what you're remembering about Mr. Hughes' chart, that we aren't masking any injuries.

And the Suboxone case, by the way, really strengthens our position with regard to the use of averages to demonstrate class-like impact and damages. So that is the limited nature of what we want to do. For what I just said, these are not lengthy declarations and they don't require lengthy depositions.

THE COURT: Give me the names of the experts for whom you propose submitting declarations.

MR. WEXLER: Laura Craft from OnPoint Analytics, Eric Miller from A.B. Data, and Meredith Rosenthal, an economist from the Harvard School of Public Health.

The other thing we would do as part of our motion is meet Your Honor's request for a trial plan that Your Honor found wanting, and a demonstration on how the case is manageable regarding -- you know, despite so-called minor difference in state law.

We can do this. We tried the Nexium case with a class certified for 26 states, so this is something we can provide Your Honor. That's something that you were unhappy

that we hadn't before, we'll do it now, but it doesn't involve consumers, only third-party payors.

THE COURT: Well, I certainly relied on Nexium in my opinion --

MR. WEXLER: (Audio interference).

THE COURT: -- with respect to antitrust injury particularly.

MR. WEXLER: Yes.

THE COURT: I'm mindful of the fact that that's not a -- that doesn't seem to be a panacea. That ruling is, I don't want to say unique to that case, because now there are two cases (indiscernible), but Nexium is not, I think, adopted nationwide.

MR. WEXLER: Your Honor, this is Ken Wexler again, I'm only -- I only raised Nexium to demonstrate -- it's for -- its demonstration of manageability because in that case --

THE COURT: What I was talking about --

MR. WEXLER: -- we were able to try it. That's all.

THE COURT: What I was talking about was the discovery you thought you needed.

MR. WEXLER: Yes.

THE COURT: And you said you needed to supplement the record with --

MR. WEXLER: Yeah.

THE COURT: -- three declarations, Craft, Miller, and

Rosenthal, and a trial plan.

MR. WEXLER: Yes.

THE COURT: The trial plan I don't think falls into the same category. I know it doesn't. With respect to three declarations, you would anticipate the defendants might file or seek -- need to file Daubert motions?

MR. WEXLER: They might.

THE COURT: Take the depositions and file Daubert motions, is that what you contemplate?

MR. WEXLER: I suspect they'll take depositions. I doubt they'll have grounds for Daubert motions, but I don't know what they're going to do.

THE COURT: All right. Is there anything else you wish to add to the record, any other supplementing for the record?

MR. WEXLER: Not sitting here right now, no. We are -- these -- this is where we are right now, and we -- the work has been done with these experts.

THE COURT: All right. Well, that --

MR. WEXLER: So it's not like we have to start -- it doesn't mean we need much delay, right?

THE COURT: Well, and that's good, and we'll get to that later.

I'll hear from the defense on this additional -- I'm not going to call it discovery, but supplementing the record

with leave to the defendants to take depositions on the newly identified issues and the experts on -- to file Daubert motions, if they deem it appropriate.

MR. SENATOR: Your Honor --

MR. WEXLER: Your Honor, this is Ken Wexler again. Can I make one comment, one more comment?

THE COURT: Yes.

MR. WEXLER: The only thing I left out that I did want to say is when we received your order and your opinion, we obviously read it very carefully, and we believed that we could not -- I mean, we took at face value that we had the right to file an amended motion if warranted by the facts and applicable law. We just got it face value and therefore made strategic decisions such as not to bring a 23(f) in reliance on it.

So I really think I'm going to appeal to Your Honor's sense of fairness about our ability to do this. We have no reason to think that we could not. Having said that, I have nothing else to say. Thank you.

MR. SENATOR: Your Honor, this is Stuart Senator on behalf of the AbbVie Defendants. We do not believe that further experts or fact discovery is appropriate here. There was a significant expert discovery period. Both parties spent a lot of time on expert discovery, and then we submitted our motions on the basis of that. The Court's decision did not break new ground, did not enunciate new law. It took

established law and applied it to what the facts were, what the expert record was, and what the factual record was.

If the plaintiffs that direct -- the indirect purchaser plaintiffs, end-payor plaintiffs, believe that on the record they created extended facts and expert discovery period can show that an end-payor or a PPP-only class is appropriate where a bigger class of the sort they moved for the first time is not appropriate, Your Honor's opinion gave them the chance to show how that can be done on the record, facts they developed in expert and fact discovery over the past many years.

But the idea that they can now roll back and redo expert discovery at not just great expense to us and to them, but at great expense to us, but also with a great amount of time required for (indiscernible) to make up, just sort of rush through and have to deal with their rushed analysis is just not appropriate.

Now, the plaintiffs say, oh, it's just three expert declarations. Well, whether it's a declaration or a report is without moment. That's a technical issue. But the fact is there were three main experts that they presented on class certification. They were Ms. Craft, Mr. Miller, and Dr. Rosenthal, and there was also Winkelman on a few issues, but those were the three main experts. And now they want to redo every single one of them.

And it's not just on minor points. This sensitivity analysis they say they want to do, that's a completely new methodology and analysis over the analysis that Rosenthal provided before. So what they're saying is let's just start over on expert discovery, and not because Your Honor announced any new principle of law or any new standard for class certification, just because Your Honor applied the very well-established Third Circuit law, and that's been in numerous cases that they said, at oral argument, as Your Honor noted, they had fully evaluated.

So I understand the point that if they think they can take the record that they've developed and fill in the gaps that Your Honor has identified, they can go forward and do that. You know, I'm obviously not the Court, and so I wouldn't presume to, you know, say anything on that. Your Honor said what he said in the class cert decision, and we take that and we say, okay, you said it's without prejudice, but they are going ahead and doing it. But that's a very different proposition from now reopening expert discovery.

And while Mr. Wexler has only mentioned expert discovery on this call, his letter also mentioned fact discovery. He says that they want to go and get new data -- Ituvia data that they would present to their economist for analysis. I don't know what that will involve on their end, or has involved on their end, but they haven't sent that data to

us. It's been almost 70 says since Your Honor's decision. In their letter to you, they said it would take them four to six weeks to get this data. We haven't seen it. We have no idea what is contained in it, the format they've got it in, what issues it raises. We haven't seen any of that, and so it can't be one-sided.

If they get to use new data, we have to examine it, have our experts examine it, potentially fill in the gaps in it, if there are gaps, or make corrections in it if we see there are corrections. Or if there is alternative data that should be considered, we need to develop that and then go to our experts with that.

So this combination that is being suggested as just a slight little thing is really a complete redo of the expert discovery period and a complete redo of the class motions, and without any change in law or legal standard that would justify it at all.

And we propose -- and I don't want to switch issues, but it's a related issue, it would be the timing of the class cert motion. And that is integrally related, obviously, to whether the plaintiff can supplement, as they put it, or as I would put it, redo discovery. Because if they're just filing a new motion on the same record, obviously it's much cleaner to respond to and could be done much more quickly, and then the replies can be much more quick and Your Honor's consideration

could be much quicker.

On the other hand, if they're redoing discovery, we need a much greater period of time and, frankly, we're behind the eight ball on that because we don't know what their discovery -- their new discovery is actually going to be, so we don't know how much time we would need.

So we believe Your Honor should stick to what we believe was apparent from the ruling in the original class cert motion on June 4th, and if they -- and on the current evidentiary record developed over the past six or seven years, fill in the gaps with a -- and correct the shortcomings with a smaller class, they can agree to that.

But if they cannot, frankly, we should just move on and no motions should be filed. The result should not be a complete do-over litigation on the class certification stage and the damages analysis and all those things.

THE COURT: Mr. Senator, I'm familiar with time involved in performing a sensitivity analysis. You started talking about that after you identified the issues regarding supplemental declarations or declarations from plaintiffs' experts. What is involved in a sensitivity analysis? How much time? What -- just what is that all about?

MR. WEXLER: Are you asking me, Your Honor?

THE COURT: I'm asking Mr. Senator first, then I'll go back to the plaintiffs.

MR. WEXLER: Okay. Sure.

MR. SENATOR: Well, Your Honor, it's not my analysis to perform, it's theirs. And so ultimately it's theirs to say what it is. And until we see it, I'm not sure how much time it will take us to respond. But the thing I would note is that it's been now 68 days or so since the class cert decision, and they've sent us literally nothing, not the additional data they want to rely on, not any sort of -- any proposed declaration, nothing, whereas they told Your Honor that it would take them four to six weeks to refile their class certification motion. So, in other words, to be done with all of this. So I do feel like we're working quite a bit behind the eight ball, having now waited over two months, seeing nothing, and then --

THE COURT: So let's --

MR. SENATOR: Well, anyway, that's what I had.

THE COURT: Let's find out about that. I think the declarations or supplemental declarations from the three experts stand apart from the sensitivity analysis. Explain what you have in mind and whether you have the data you talked about, Mr. Wexler.

MR. WEXLER: Yes. Like I said, Your Honor, the work has been done. Dr. Rosenthal has drafted a declaration using the data that she took time to get, which obviously we -- you know, I love Mr. Senator's complaining we didn't give him anything when he's fighting for us not to do anything.

But in any event, we'll produce the data with the declaration and it's been done. It's 22 paragraphs. This is not -- if anybody recalls, it's not the hundreds of paragraphs that were filed previously. We're not doing a redo.

THE COURT: We don't know that.

MR. WEXLER: I'm telling you -- I'm an officer of the court representing it. That's the truth.

THE COURT: Well, and who prepared that declaration? Dr. Rosenthal?

MR. WEXLER: Yes. And so it's going to be part of our motion --

THE COURT: And how will all --

MR. WEXLER: -- if we're permitted to file it.

THE COURT: How long (audio interference) paragraphs?

MR. WEXLER: I'm going to ask Mr. Boley.

How many pages, Justin?

MR. BOLEY: I think it's -- I will have to double check. It is very short. These are three and four paragraphs. These are not -- it's not 20 paragraphs of 15 and 20 lines, Your Honor.

THE COURT: And the declarations -- you have declarations from the other experts, Craft, Miller, and Rosenthal?

MR. WEXLER: Not -- no, not yet, but the work is done. I mean, Mr. Miller, we're talking about he's simply

going to testify that in this case they will give direct notice to third-party payors. And again, because Your Honor was concerned about ascertainbility facilitating the best notice practicable, you can't get better notice than direct notice, and so that's all his declaration will say.

Ms. Craft, I don't know the length of it. It's simply going to explain the methodology for applying the two exclusions to the class definition. And also they will provide -- they will provide cost information to how much it will cost to do that.

THE COURT: Exactly what (audio interference) do you seek to supplement the record with? Is it correct to say you're talking about three declarations from Craft, Miller, and Dr. Rosenthal?

MR. WEXLER: Yes.

THE COURT: Period?

MR. WEXLER: Period. Yeah, that's it.

MR. SENATOR: Your Honor, if I could just be heard on that? That bit is so misleading. Dr. Rosenthal is doing economic work. It's not how long a paragraph is. Often these economists say see my analysis, and you've got a whole chart. And then sometimes it's just a summary chart. But then we get these backup files and programs and things that have to be run through analysis, and it's all in the -- it's all in the stuff that, frankly, when you see the declaration, is sort of

invisible. But that's where all the analysis is, is in the economics, on Dr. Rosenthal. So I think that counsel's attempt to say it's just three declarations and they're short doesn't cut it here.

And then on the Craft declaration, I truly don't understand what -- why there's anything to add. They proposed the class definition before and they put forward the exclusions. Ms. Craft had a full and fair opportunity to put forward whatever methodology, whatever she wanted to say, as did Mr. Miller, as did the plaintiffs. So I -- it's just a mystery to me why she now needs to come forward with some new declaration that says something new on the exclusion methodology.

Mr. Wexler said at the hearing that they had presented everything they wanted to present, everything necessary to present, and they couldn't -- I don't have the direct quote in front of me, but he said words to the effect, frankly, if we haven't done it yet, it's just impossible to do.

MR. WEXLER: Can I defend myself for one second, Your Honor?

THE COURT: I don't think that's necessary.

MR. WEXLER: Okay.

THE COURT: I think there were some statements to that effect --

MR. WEXLER: I believe it. I truly believe it.

THE COURT: For other's sake (indiscernible). Well, and what I want to address now, very briefly, because end-payor plaintiffs referred to it, they say that defendants previously agreed to a schedule which included submission of supplemental expert I'm going to call it "discovery," it's declarations or reports. Tell me about that and the disagreement over whether that was actually done.

First, Mr. Wexler and Mr. Kodroff.

MR. WEXLER: Well, Your Honor, we were -- as I said in my letter at the time, I was up front. I said we want to file a renewed motion. We would do so in 60 days because at the time we hadn't obtained the data yet, and we were ordering it. And we had a couple negotiations, me and Mr. Senator and Ms. Allon, regarding 60 -- it was 60 days to file, then 60 days to respond, and there was a disagreement among us -- I mean, the issue arose that -- when class was briefed the first time, all of the experts -- the reports were exchanged and the experts' depositions were taken before any briefing. And that sort of became an issue.

I was concerned that if we did, that we would -- it the was then going to extend the schedule even further. But we -- it appeared that we were -- that the only -- it appeared we had agreement on 60/60 -- I believe 30, but then Mr. Senator wanted to file a reply, to which I said it's too soon, I'm not going to agree for you to file a reply.

In any event, Ms. Allon suggested that we simply agree that if they want to file a reply, we'll meet in good faith; and if there's still a dispute, we'll bring it to the Court. It seemed like a minor thing. And then, all of a sudden, a light bulb went on over Mr. Senator's head and he said, no, wait a minute, I'm not so sure I want to -- that you should be able to file anything at all. And that's where it broke down. So we just -- you know, and that's where it went.

THE COURT: Mr. Senator, do you wish to respond?

MR. SENATOR: All I'll say, Your Honor, is that we had two discussions. And over the course of the discussions, the extent to which the EPPs wanted to supplement the record -- again, with their terminology -- kept evolving, where originally it sounded like it was a very minimal, almost technical supplement, and then it became we're getting new data, we're doing new economic analysis, and -- you know, it just became apparent that what they were really talking about was a redo of expert discovery. And that we thought was just not appropriate.

MR. WEXLER: I disagree with that characterization, but --

THE COURT: Well, I've heard --

MR. WEXLER: -- (indiscernible.)

THE COURT: -- your back and forth, and I can't tell, sitting here, the extent to which what is being

requested will result in a redo of expert discovery. It sounds like it's not quite as simple an issue as the EPPs claim, and nor do I think it's as complex as you have stated, Mr. Senator.

What I'm going to do is allow this limited supplementing of the record with declarations from the three experts, and I'm going to permit the defendants to depose them. And what we will do with regard to challenges to their reports is in responding -- all of this will be before the motion -- the amended motion is filed. The responses -- I debated about whether the responses to the motions should include challenges to the experts' new declarations or whether I should provide for separate Daubert motions. And I think separate Daubert motions, focused on the issues, is most appropriate.

I don't need a review of the Daubert standard, which is usually five or six pages. I do not need that. I'm familiar with the Daubert standard. And so that's what we'll do. We'll have this limited discovery. We'll set a schedule. And we'll do the page limits first and then the schedule. And we'll have -- the amended motion will be filed. The defendants will then respond and file Daubert motions. The end-payors will respond to the Daubert motions and they will have an opportunity to reply to the class certification motion. So we'll have that motion, the motion (indiscernible) response and reply. With regard to the Daubert motions, at that stage we'll have Daubert motions and a response. So we'll plug in a reply

to Daubert motions -- in support of the Daubert motions. We're not going to have surreplies.

We're going to try to limit it in page numbers, and we'll talk about page numbers next. And then when we determine the pages, we'll talk about a schedule. But what I had in mind is a very tight schedule, start to finish, I think we could do this in three months, and maybe even shorter. But we'll do that and we'll go through that now.

First, page limits. On the motion for class certification, I think that was made easy by Mr. Wexler who said the defendants have 25 pages, that works for them. Is that a correct statement?

MR. WEXLER: Yes, it is.

THE COURT: Ms. Senator, you said -- is that a correct statement of your position?

MR. SENATOR: We had proposed 25 pages when -- with the premise that there was not going to be further discovery. Perhaps we can both still do it in 25, but that was our premise. So I guess I would just like to hold out that depending on what happens with the discovery, we could come back to Your Honor if we needed to, although I have no desire to do that or to write a long brief.

THE COURT: No, no, let's --

MR. SENATOR: And I (indiscernible16) to read it.

THE COURT: That's absolutely true. And I was really

talking just about the motion, and the motion or the amended motion at 25 pages. And I think we should -- because I don't think you knew you were filing Daubert motions, we can increase that by a little bit. And how would you split -- well, let me hear your position now, knowing that you're going to be filing a response to the amended motion and a Daubert motion, how many pages for each document?

Mr. Senator.

MR. SENATOR: Yes, Your Honor. I'm just pausing to consider that. I think what I would suggest would be -- I wondered if we could have a combined total that we could essentially allocate however we wanted, because it's hard for me to envision in the abstract without having seen their three different -- or I guess their motion and their declarations, how I would allocate from one to the next.

THE COURT: Assuming I say "yes," what's your answer?

MR. SENATOR: I guess my suggestion would be 45 total, with the assumption it would be a 25-page -- my building blocks in my mind are a 25-page motion, opposition, and 10 page each Daubert. So that would be a total of 45, although I did reallocate it.

THE COURT: Well, I don't think you need -- if you scrap the Daubert standard, I don't think you need 10 pages for each Daubert motion. But I'll reduce that just a little bit to a total of 40, and you can allocate it. A total of 40 pages.

your response to the amended motion and your filings -- well, not -- I guess you can file two Daubert motions. It really doesn't matter.

Next we're going to have the plaintiffs' response to the Daubert motions, and I'll grant leave to file a reply on the class certification motions. And I think since we allowed you to combine, we'll allow the plaintiffs to combine. What's your answer then?

MR. WEXLER: Your Honor, this is Ken Wexler. I think 35 pages should be enough.

THE COURT: I think a little -- I was thinking a little less. I can go 30 -- we'll make it 30, Mr. Wexler.

MR. WEXLER: Okay.

THE COURT: And finally, that will make -- the amended motion for class certification fully briefed. The Daubert motions we'll give the defendants, in order to balance this, an opportunity to file a reply in further support of the Daubert motions.

How many pages, Mr. Wexler?

MR. SENATOR: I think that would be us, Your Honor

MR. WEXLER: That's them. I was going to say zero.

(Simultaneous speaking)

THE COURT: I'm sorry. I misspoke. Yes --

MR. SENATOR: That's okay.

THE COURT: Mr. Senator, I don't think Wexler is

filing a reply in (indiscernible) support of the bankruptcy.

MR. WEXLER: I'd suggest 15, Your Honor.

THE COURT: Okay. 15 pages. Now let's talk about time. I think we've got the (indiscernible) of it.

MR. WEXLER: Your Honor, there's a potential -- this is Ken Wexler again, for the record. There's a potential issue that I see, is that if they respond and they want to introduce contrary expert declarations, there's no room for us to take depositions or file our own Daubert. I don't know that they will, but that was left out.

THE COURT: Mr. Wexler, what's -- I'm sorry. Mr. Senator, what's your thought?

MR. SENATOR: I don't know what we will do on our experts as a result of theirs. I'd be surprised if we didn't do -- put anything in evidentiary. If they want to challenge those by Daubert, I suppose they can do that.

(Simultaneous speaking)

MR. WEXLER: Thank you.

THE COURT: And they would say the same about you. Now, when would you do that, with your response?

MR. SENATOR: Well, we could -- if they're doing -- as Your Honor mentioned, they would submit their -- or serve their new or supplemental expert reports before the filing of the motion, the question is really the schedule.

They've now had almost 70 days, and I don't know when

the date is that will be picked by the Court for them to actually serve them, but they're going to have at a minimum, I would assume, about 80 days to put these things together. And just in terms of scheduling, I would think if they -- I don't want to suggest too long a period for us to respond and to delay the briefings starting on the motion. On the other hand, I also don't want to (audio interference).

One thing they could do is they could submit their expert reports very quickly now, and then have a little bit more time for their filing their actual motion. And then -- you know, so we could get started working on their expert reports and what we're going to do in response to them. And then we would put all -- put our contrary experts, to the extent we have them, with our opposition briefs. But there would be that little bit of overlap so that some of our time in evaluating their expert reports and developing our own responses wouldn't be -- you know, would be time they'd also be spending finishing their opening briefs.

MR. WEXLER: I don't follow, Your Honor. It seems --

MR. SENATOR: So what I'm saying is, say Mr. Wexler's reports are due 10 days from now; his brief is due, whatever, 20 days from now; and then our opposition and response experts are due the 40 days thereafter. That means our total time for our experts is 60 days, and -- but the schedule isn't pushed out as far. That's all. As opposed to our doing experts

before he even files his opening brief, which then requires the whole schedule to be pushed out further.

THE COURT: Well, let's go ahead and use some real time now and plug in these events, because we haven't talked about scheduling of any expert depositions, and we haven't talked about the date for admission of expert declarations and responsive declarations, and we ought to do that.

And I guess we start with the proposition -- I guess we're going to start -- we will start with how long it will take to file an amended motion for class certification with these (indiscernible) declarations.

MR. WEXLER: Your Honor, Ken Wexler again. I -- we were planning on advising the Court that we would do so -- we would file our motion with supporting declarations in 21 days.

THE COURT: Okay.

MR. WEXLER: If we did that, then they would be able to build in time to take our experts' depositions and --

THE COURT: All right. Let's just go through the current schedule.

MR. WEXLER: Yes.

THE COURT: 21 days and -- the start -- I'm looking at a calendar. That would take us to September 8th. No.

MR. WEXLER: September 1st.

THE COURT: That's Labor Day. We'll make it September 4th, a little more than 21 days.

All right. Next thing we have to schedule would be depositions of plaintiffs' experts.

MR. WEXLER: I would offer that the depositions be taken and they file their (indiscernible) 60 days after September 4.

MR. SENATOR: I think that really would cramp us, frankly. I would request 30 days to do the deposition, which will be -- you know, we have to digest their reports, we have to talk to our experts, figure out what the issues are, we have to look at the data. It's not a deposition that we're going to do overnight.

MS. ALLON: Your Honor, this is Devora --

THE COURT: These depositions -- let me just finish, then I'll -- then you can speak.

These depositions -- first of all, these reports, as I hear what's being said, are not going to be that complex. They're going to be much, much, much scaled down from anything that you got originally, because the issues are much more narrow. They're going to address primarily the ascertainability issues that I raised in my opinion. And I'm told that of the six or seven -- I think there were seven major ascertainability issues, five are gone, two remain. So I don't think we're talking about full-scale expert discovery again.

And you're talking about three experts. I think -- if anything, you'd have the benefit of scheduling depositions

and then scheduling a response to the motion.

MS. ALLON: Your Honor, this is Devora Allon. Can I just make a point briefly?

THE COURT: Yes.

MS. ALLON: Just from TEVA's perspective, first of all, I would say, you know, the second half of September and into October is the Jewish holidays. That's going to materially affect our ability to be involved in depositions. So that's the first point I would make.

And then the second point I would make is I expect that to the extent we are going to put in responses, we will have two to three experts who will have to put in responses. But before we can be prepared to depose their experts, we'll need to have our experts assess the data and digest it and help us to prepare.

And so my suggestion would be -- I don't think there's a need for an interim deadline for depositions, but I would request a total of 90 days to put in our opposition brief and any opposition reports or responding reports.

THE COURT: All right. Well, it's not that I'm being harsh, but I think you're overdoing it. If the schedule doesn't work, you'll seek an amendment. But I'm going to give you 60 days to accomplish that. So it will take us from September 4th to November -- make it November 6th. That's the date by which defendants take depositions of plaintiffs'

experts, respond to EPP's motion -- amended motion, and submit expert reports. If that proves to be too tight, well, then tell us.

All right. Now we have to schedule Daubert motions. So same schedule? Might have 60 -- you have 60 days, can you do that?

MR. WEXLER: Well, that would be -- they'd be filing -- this is Ken Wexler. They'd be filing their Dauberts with their responses, right?

THE COURT: Yes.

MR. WEXLER: Okay. Well, and then -- Your Honor, with regard to the reply, because once they file their responses, they're saying they will submit expert declarations or responses. If we could file our reply -- take the depositions and file their reply in 45 days, that would work for us.

THE COURT: This is your reply to the --

MR. WEXLER: In support of class, yes.

THE COURT: They will have filed Daubert motions, so you'll file responses to their Daubert motions, take deps, file your own Daubert motions. Okay. And you need 45 days, so October 9th.

UNIDENTIFIED: November --

THE COURT: I'm sorry. November 9th. November 6th. November 6th. 45 days will take us probably right to

Christmas.

UNIDENTIFIED: I think before. Let's see.

THE COURT: Yeah, it will. Let's press that to -- make it November -- December 18th.

MR. WEXLER: All right. We'll make it work, Your Honor.

THE COURT: Okay.

MR. SENATOR: And Your Honor, I -- this is Stuart Senator. I assume with that there's no further expert reports, no rebuttal expert reports or further evidence to be introduced at that stage.

THE COURT: I don't think so. Not on this record that we're developing today. But we've got -- we've got a reply to the amended motion and Daubert motion and this is plaintiffs' -- that's the plaintiffs' experts and responses and defendants' responses I assume for plaintiffs' motion, and defendants' expert reports. Then we have --

MR. SENATOR: Then we would just need our reply -- the defense reply on the Daubert motions.

THE COURT: On Daubert.

MR. WEXLER: Your Honor, I don't believe we have replied on the Dauberts previously. If that helps.

THE COURT: The Dauberts that we've ruled on.

MR. WEXLER: Yes.

THE COURT: Well, since we're lumping together what

needs to be done, page limit wise, I'm not so concerned about that. And the only thing remaining now is the defendants' reply on Daubert issues. And that's --

MR. SENATOR: Well, also the EPP reply.

THE COURT: Pardon me?

MR. SENATOR: The EPP reply --

THE COURT: Yes. Yes, but we've already covered that in pages.

MR. SENATOR: Right.

THE COURT: And (indiscernible) but let me make sure this works, the dates work. And we still don't have a date on defendants' reply on Daubert. I think we'll do it right after the first of the year, January 8th. And that will be ten pages for him (indiscernible) reply. The amended motion filed --

MR. SENATOR: Your Honor --

THE COURT: Yes?

MR. SENATOR: Could I just make one request? We still feel a bit backed up on the 60 days through the Jewish holidays, with opposition and the preparation of the defense expert report. And so my proposal is not to change that November 6th date, but to see if plaintiffs could serve their -- not their briefs, which is due September 4th -- their opening briefs, but the expert reports that they've been preparing this summer. If those can be served in the next two weeks, say by August 25th, two weeks from today, so we can have

a bit of extra time and a bit of a head start before Labor Day in sharing those with our experts and getting them going on that. And that seems to comport with what Mr. Wexler was saying he needed when he was explaining to Your Honor early in the call why these weren't that significant or extensive reports.

THE COURT: Can you do that, Mr. Wexler?

MR. WEXLER: We can try, yeah. I mean, I -- there are some technical things that I need to make sure of. But you can put it down and if we need relief from it, we'll give you a reason. But as of sitting here right now, I think we can meet that.

THE COURT: Plaintiffs' expert reports. The date we have picked now was September 4th. And if we back up two weeks, August -- two weeks would take us back to August 21st. Today is August 11th.

MR. WEXLER: I thought Mr. Senator -- and you can correct me if I'm wrong, Stuart -- was asking us to move it up a week, so that would make it August 28th.

(Simultaneous speaking)

MR. SENATOR: The date I had asked for was August 25th.

THE COURT: Mr. Senator --

MR. SENATOR: The date I had asked for was August 25th, two weeks from today. But obviously if Mr. Wexler can do

it on August 21st, 10 days from today, that would be (audio interference).

THE COURT: Well, no, Well, I didn't get the date. And what we'll do is we'll pick the earlier of the two dates and see if it works, and that would be August 25th.

Let me go through this schedule. And that will -- just to make sure. The amended motion September 4th. The amended expert reports or declarations, or supplemental expert reports or declarations, August 25th. Depositions and -- depositions of plaintiffs' experts, defendants' response to end-payor plaintiffs' motion, and defendants' expert reports November 6th.

Next on the schedule, plaintiffs' reply in further support of their motion. And Daubert motions, by the way, I forgot, November 6th. Plaintiffs' reply in further support of their amended motion, their response to defendants' Daubert motions, and the Daubert reports, the -- I'm sorry, the expert reports for the defense, what date had we selected?

MR. SENATOR: The defense expert reports would be the same, November 6th date, as the defense opposition brief.

THE COURT: Okay. The next, December 18th, plaintiffs' reply in further support of the amended motion, a response to the defendants' Daubert motions, and plaintiffs' Daubert motions, I think -- yes, plaintiffs' Daubert motions, and the date for that is December 18th. And defendants' --

allowing replies to the Daubert motion -- I just want to be sure I've covered everything.

MR. SENATOR: Your Honor, if I just may --

THE COURT: Yes.

MR. SENATOR: -- you as my -- on behalf of my team, I'm just trying to reply on Daubert. Could we have the weekend? So not January 8th and instead Monday, January 11th? That's the first week-- although this year is obviously unprecedented, that's the first week of the year when -- I don't know when people will be back from what hopefully will be allowable vacation.

THE COURT: All right. Okay. January 11th then. And the only thing filed then will be the Daubert reply, ten pages.

UNIDENTIFIED: Have we covered the schedule?

MR. WEXLER: That's actually -- Your Honor, Ken Wexler. That has been a response to our Dauberts, but we need a date for reply in support of our Dauberts --

MS. ALLON: Well, just to be clear, Mr. Wexler, that's our opposition to your Dauberts. I think the schedule is each side gets the opportunity to oppose Dauberts, but we're not going to have another round of reply briefs.

THE COURT: I didn't say that. I thought we were allowing -- I think I've already included reply briefs.

MS. ALLON: On the Dauberts, Your Honor.

MR. WEXLER: Yes. He did include --

THE COURT: -- so I think you're wrong, but the bottom line -- that's your response -- defendants' -- plaintiffs' response, defendants -- on January 11th we --

MR. WEXLER: I believe that's defendants' response to our Dauberts --

THE COURT: Yes.

MR. WEXLER: -- EPP's Dauberts, right? So then we just need a time for a reply, and a page limit.

THE COURT: Right. Well, the page limit, we'll limit the pages in the responses and replies to ten. And plaintiffs' reply, two weeks later, January 25th.

I think this works. I have a law clerk and a legal assistant on the call; and if I don't get it straight, I'm sure they will. We've really taken issues that -- most have been resolved by agreement, although not surprising to me that he didn't agree to anything.

MR. WEXLER: Sad but true.

THE COURT: Next, I'd like to talk about the schedule, any remaining scheduling matters. I'm not sure. I think we've talked about page limits, and I think the schedule is done. Is there anything else that we have to do?

MR. SORENSON: Your Honor, this is David Sorenson. May I be heard briefly?

THE COURT: Yes.

MR. SORENSON: Just -- I understand Your Honor's rulings on the sequencing, but what is now apparent is that if we're waiting until after the EPP renewed motion is not just briefed but decided before we move on to summary judgment for the rest of the case, we're talking about summary judgment briefings starting, you know, I don't know when next year. First quarter, second quarter, I don't know when we would be starting.

So I would just ask Your Honor to at least consider the possibility of starting summary judgment briefing before then, if not now, which I understand you're not inclined to do, but perhaps overlap with this EPP briefing, so that at some point in the next -- before the end of the year, we can get started on briefing on summary judgment and substantive Dauberts.

And second, I want to come back to the 23(f) point I made earlier. Whoever wins, whoever loses the EPP class renewed motion, I would fully expect, having seen this, that someone is going to file a 23(f). And I wanted to flag that because what I fear is that whoever files that 23(f) will accompany it with a motion to stay proceedings before Your Honor and put off summary judgment briefing even longer. And I just wanted to flag that, because obviously that would just add even more and more, months and months of delay. So I just wanted to touch base on both of those things before we ended

the call.

THE COURT: I wish -- I see, Mr. Sorenson. Well, I think what you want me to do is to press a button and make all of these problems go away. And unfortunately, they can't and won't. I've already ruled that summary judgment I don't think can fairly be deferred -- can be handled at this time. And in order to be fair to both sides, it will be deferred. I've ruled --

MR. SORENSON: Yes, Your Honor.

THE COURT: -- for an hour and a half plus, and I'm not going to change my mind. If you're telling me that the task ahead is arduous and long and difficult, thank you. I got that. And you've made it so. And that's your right. You have a right to do that. But what you just told me tells me nothing. What it does tell you is that maybe you ought to have some serious settlement discussion, because we are looking at a long, expensive path. And you pretty much know where you are. The past direct purchasers are certified, the end-payor purchaser class was not. I think the end-payor purchasers have a difficult task ahead of them in order to succeed on class certification. They think otherwise. I'm giving them a chance.

Maybe this is an opportunity to discuss settlement. Although if you don't, the case will be on hold for quite some time, because there won't be very many developments that will

make it easier for you to decide any issues regarding settlement between now and sometime in, I would say, mid-2021.

Is there -- well, would it be helpful to you if I again used my typical provision, which is the settlement provision, direct that you meet and confer and advise me, in a certain period of time, that you think further settlement (indiscernible).

Refresh my recollection. I've got hundreds of files, and none of the paper in front of me. And I haven't downloaded the voluminous docket entries. I have some of them. Has there been settlement conferencing in this case? I think there has.

MR. SORENSON: Well, Your Honor -- this is David Sorenson again. There was -- and I don't have it right in front of me, but my memory is that at your direction we did -- I think all plaintiffs, actually, made settlement demands of defendants --

THE COURT: -- yes.

MR. SORENSON: -- and -- right. And the defendants, at least to the direct purchaser class, did not make a counter-offer of any type at that time, and that's -- that was it.

And then there was some discussion, I think, on a couple of conference calls with Your Honor in which I think -- and obviously the defendants will correct me if I'm wrong about this, but I think there was a general view among the parties that settlement discussions would be profitable again after

summary judgment was briefed, before a decision.

Perhaps -- I will -- can certainly consult with my colleagues -- from the plaintiffs' standpoint whether, you know, something before then would be productive on our side. I'll certainly talk with my colleagues and other plaintiff groups about that. But that's, I think, where it has last stood by my memory --

THE COURT: I think your recollection is correct. And it is strange, but it was at your suggestion -- I mean the collective you, not just you, Mr. Sorenson -- that settlement again be discussed after the briefs on summary judgment were filed, but before that -- before those motions were decided.

Well, I think what I'm going to do, without asking any more questions, in view of this lengthy schedule, is to give you a month to meet and confer, and jointly report to me on whether you believe either settlement conferencing before a magistrate judge or some other form of ADR, such as -- and I won't specify, but just mediation -- private mediation, might be of assistance in resolving the case.

And if yes on that, tell me when we'd be ready to proceed. And also I'll give you an opportunity at that stage, whenever it occurs, to tell me whether you both agree -- or all agree that the scheduling order can be vacated. In order to proceed with either settlement conferencing or other ADR such as mediation, you all must agree.

And in order to agree -- in order to obtain a vacator of the schedule, to take you offer the schedule that you're on, you'll all have to agree to the vacator. If the schedule is vacated, and the case is not settled, I would just pick where we left off. You wouldn't be penalized. You'd be able to argue to me as to how much time -- additional time you need. And I'll give you 30 days to submit that report.

MR. SORENSON: Okay, Your Honor. Yes, Your Honor. And this is Mr. Sorenson again. Your Honor, I apologize. I was not trying to imply that it was as easy as pushing a button. I appreciate this is a complex case with a lot of lawyers and a lot of work. And I didn't mean to suggest otherwise.

THE COURT: Well, I'm glad you didn't. Your class certification motion is a lot easier to address than the end-payor plaintiffs'. But I suspect that the help with the new motion, the amended motion, is easier than the last one, which I found very difficult. I think we got it right, but who knows.

In any event, you'll get a schedule covering everything that we've agreed upon, and also the 30-day -- the roughly 30-day settlement point.

Okay. Now, in case we come up with some hiccups, I don't want to put everybody on the line to discuss tweaking of the schedule if we find there's some issue as we try to put all

these words to paper. I want to be able to talk to all liaison counsel, and we might do that -- we might have to do that, might not.

In addition to everything else, I should tell you that the law clerk familiar with the case -- we lost a law clerk a year ago. Now we have another law clerk familiar with the case, he's leaving Friday. We're going to get this order out before then, but in the event we have any issues, I will take it up with liaison counsel. And because I want the issues resolved quickly, I'll rely on the liaison counsel to report and will not invite other counsel to participate. What we'd be talking about is perhaps an inconsistency in the scheduling or a question that we had regarding the schedule.

And now one last question for the electronic sound recording operator. How much time will it take to get a transcript, as soon as we can get one?

THE CLERK: Judge, I can do a daily request, and probably Thursday.

THE COURT: That's great. I thank you very much for (indiscernible) have a report of your name, but why don't you put your name on the record so counsel can identify you.

THE CLERK: My name is Carl Hauger.

THE COURT: Thank you very much for your patience. I'm certain the record will be clear and concise and thank you for your service today. You were drafted. You're not usually

assigned to me, and this was a long and very technical conference, and I forgot to ask counsel to identify themselves when we started, and I think you got the identification. It wasn't that difficult. In any event, thank you very much for your service.

Is there anything else you have to address? Plaintiffs first, Mr. Wexler, Mr. Kodroff?

MR. WEXLER: No, Your Honor.

THE COURT: Mr. Sorenson, for the direct purchaser?

MR. SORENSON: No, Your Honor.

THE COURT: All right. Now for the defense, Mr. Senator?

MR. SENATOR: No, Your Honor. Thank you for your time today.

THE COURT: You're welcome.

Ms. Allon, anything --

MS. ALLON: No, Your Honor. Thank you.

THE COURT: Anyone else? Walgreens? CVS/Rite-Aid? Giant Eagle?

UNIDENTIFIED: No, Your Honor.

UNIDENTIFIED: No, Your Honor.

THE COURT: All right. I'll end the conference and we'll try to get an order out promptly. To the extent that my legal assistant thinks she will have to do the order, she will not. To the extent my law clerk thinks he will have to do the

order, he will. And I want you to call me right back.

THE CLERK: Will do, Your Honor.

THE COURT: All right. Thank you very much.

ALL COUNSEL: Thank you, Your Honor.

THE COURT: Take care. Bye now.

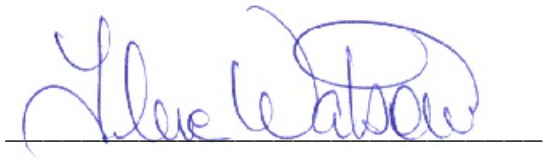
UNIDENTIFIED: You, too.

(Proceedings concluded at 4:45 p.m.)

* * * * *

C E R T I F I C A T I O N

I, Ilene Watson, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



ILENE WATSON, AAERT CER/CET 447 DATE: August 13, 2020

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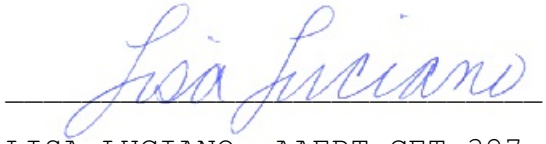
C E R T I F I C A T I O N

I, Lisa Luciano, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



LISA LUCIANO, AAERT CET 327 DATE: August 13, 2020

ACCESS TRANSCRIPTS, LLC

EXHIBIT C

From:	Justin Boley
To:	Senator, Stuart; XT Allon, Devora
Cc:	Young, Blanca; Wu, Jeffrey; XT Russell, Alexandra; Kenneth Wexler; "srobertson@cohenmilstein. com"; Tyler Story; Jeffrey L. Kodroff
Subject:	RE: Niaspan
Date:	Thursday, December 17, 2020 1:30:53 PM

Stuart,

We respectfully disagree with your position. We intend to file a motion for leave to file a reply report and will attach the proposed reply report to our motion papers, as has been the practice in this case when filing such motions. Defendants will have an opportunity to file an opposition and are free to present whatever arguments they wish to at that time.

While we disagree with your position, we do not intend to quote from Ms. Craft's reply report in our reply papers and will not attach it as an exhibit. We reserve all rights to ask the Court to allow us to supplement the record as necessary should our motion for leave be granted.

Justin N. Boley

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From: Senator, Stuart <Stuart.Senator@mto.com>
Sent: Wednesday, December 16, 2020 5:41 PM
To: Justin Boley <jnb@wexlerwallace.com>; XT Allon, Devora <devora.allon@kirkland.com>
Cc: Young, Blanca <Blanca.Young@mto.com>; Wu, Jeffrey <Jeffrey.Wu@mto.com>; XT Russell, Alexandra <alexandra.russell@kirkland.com>; Kenneth Wexler <kaw@wexlerwallace.com>; 'srobertson@cohenmilstein. com' <srobertson@cohenmilstein.com>; Tyler Story <tjs@wexlerwallace.com>
Subject: RE: Niaspan

Justin,

Defendants oppose an additional "reply" report by M.s Craft, as set out more fully in the attached letter.

Stuart N. Senator | **Munger, Tolles & Olson LLP**
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From: Justin Boley <jnb@wexlerwallace.com>

Sent: Wednesday, December 16, 2020 10:29 AM
To: Senator, Stuart <Stuart.Senator@mto.com>; XT Allon, Devora <devora.allon@kirkland.com>
Cc: Young, Blanca <Blanca.Young@mto.com>; Wu, Jeffrey <Jeffrey.Wu@mto.com>; XT Russell, Alexandra <alexandra.russell@kirkland.com>; Kenneth Wexler <kaw@wexlerwallace.com>; 'srobertson@cohenmilstein. com' <srobertson@cohenmilstein.com>; Tyler Story <tjs@wexlerwallace.com>
Subject: RE: Niaspan

Stuart,

Thanks for agreeing to the additional pages.

As the moving party, we bear the burden on this motion and believe a rebuttal report is warranted on this basis alone. But Mr. Dietz also went beyond the scope of Ms. Craft's report and the Court's opinion, including in dealing with the ASO/TPA issue and the Optum data.

Let us know your position.

Thanks,

Justin N. Boley

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From: Senator, Stuart <Stuart.Senator@mto.com>
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Subject: RE: Niaspan

Justin,

The page increase is fine. We'd like to understand more about what you envision substantively for the proposed Craft rebuttal report. As you know, the main thrust of the opposition was that Craft and EPPs had not made the required showing, which doesn't seem to us to merit a reply report, especially on a renewed motion, following the various other documents that Craft and EPPs have already submitted.

Stuart

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From: Justin Boley <jnb@wexlerwallace.com>
Sent: Wednesday, December 16, 2020 9:05 AM
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Subject: Niaspan

Stuart, Devora,

EPPs seek Defendants' consent to extend the page limit for their upcoming class certification reply by 5 pages, in parity with Defendants' recent filing, and to file a short rebuttal report on behalf of Ms. Craft, addressing the report of Mr. Dietz and his related testimony.

Please let us know your position by this evening if possible. Thanks.

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*ADMITTED IN DC.
ALL OTHERS ADMITTED IN CA

December 16, 2020

Writer's Direct Contact
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TO: EPP's Counsel in Niaspan Antitrust Litigation

Re: *Potential Reply Expert Report of Ms. Craft Regarding EPPs' Renewed Motion for Class Certification in Niaspan Antitrust Litigation*

Dear Justin:

We cannot agree to EPPs' request, just two days before their reply brief on their renewed motion for class certification is due, also to present a reply expert report from Ms. Craft. You mention two issues Ms. Craft would address; both have been present in this case all along—including specifically with respect to EPPs' original motion for class certification. It was EPPs' and Ms. Craft's choice not to address them in Ms. Craft's supplemental declaration in conjunction with EPPs' renewed motion opening papers. There is no basis to submit yet another Craft report on reply to that renewed motion.

1. The "ASO/TPA issue" addressed in Defendants' November 6, 2020 opposition to EPPs' renewed motion for class certification and in Mr. Dietz's concurrent expert declaration is not a new or surprising subject matter. It was raised by defendants in their opposition to EPPs' original motion, and it is a known and indeed central issue on ascertainability. *See* Opposition to EPPs' Motion for Class Certification, Docket No. 608, filed Feb. 25, 2019, at 14 ("insurer acting in an administrator services only (ASO capacity)"); *id.* at 15-23. ASOs' roles were also discussed at depositions in conjunction with EPPs' prior class certification motion, including the deposition of EPPs' prior class certification expert, Mr. Winkleman, and their damages expert, Dr.

Rosenthal – testimony discussed in Defendants' opposition to EPPs' prior motion. *Id.* at 17 (discussing Rosenthal and Winkelman testimony regarding ASOs).

It was EPPs' and Ms. Craft's clear choice not to address this issue in the renewed motion and in Ms. Craft's supplemental declaration in support of that motion. Indeed, Ms. Craft – not Defendants' counsel – was the first one to mention ASOs and TPAs at her deposition. Craft Oct. 14, 2020 Depo. Transcript, at 33:22-34:1 ("So that's the party that's entering into the agreement with the PBM and, further, to identify those instances in which the contracting party may be acting as an administrator, whether ASO or TPA, for a fully insured plan."). Before any follow up on ASOs/TPAs by Defendants' counsel, Ms. Craft again returned to the subject herself. *Id.* at 45:8-14 ("And this is true whether there's a fully insured health plan or an ASO or a TPA because . . . ."). The issue then became a subject to which Ms. Craft returned again and again in the deposition:

- 106:23-107:4 (". . . and the information about whether the contracting party is, in fact, the insurer or is an ASO or TPA")
- 107:15-16 ("That would be your ASO or TPA relationships.")
- 111:4-9 ("the particular tables that I'm talking about . . . identify whether that entity which has contracted with the PBM is contracting in a capacity as an ASO or TPA . . . ")
- 113:19-114:6 ("and then recognize relationships between TPAs as opposed to – and I'm going to put in a bucket here together, ASOs and TPAs . . .")
- 121:19-122:1 (". . . the party being billed is a TPA or ASO, in which case . . . ")
- 122:21-24 ("some benefit managers that enroll clients as TPAs do.")
- 123:4-7 ("Are you using a TPA? Are you not using a TPA?")
- 124:7-13 ("If the contracting party is acting as an ASO or a TPA . . .")
- 124:14-24 ("to determine whether the client relationship is an ASO; as a TPA")
- 125:17-20 (". . . if the billing party is an ASO or a TPA . . . ")
- 128:1-3 ("So the only thing you're missing is if that billing party who you sent your invoice to is an ASO or TPA . . .")
- 129:9-13 ("where your billing party is an ASO or a TPA")
- 134:4-9 ("ASO or a TPA")

- 144:25-145:4 ("ASO or a TPA")
- 152:7-9 (". . . identification of an ASO or TPA . . . ")
- 155:13-17 ("it is not designed to identify the ASO or TPA relationships")

That deposition took place weeks before Defendants filed their November 6, 2020 opposition and Mr. Dietz's concurrent expert declaration.

2. There is also nothing justifying a reply expert report to address the Optum data that was discussed in Defendants' November 6, 2020 opposition to EPPs' renewed motion for class certification and in Mr. Dietz's concurrent expert declaration. As with the ASO/TPA issue, it has been present all along. For example, Defendants specifically criticized Ms. Craft in their opposition to EPPs' initial class certification motion for Ms. Craft's failure to "even review the data produced in this case." Docket No. 608, at 36. This was also a subject discussed by Judge DuBois in His Honor's memorandum opinion. Docket No. 708, at 17 (referring to "Craft's failure to review the data produced in this case"). And both in her prior declaration and in her current declaration Ms. Craft relies on a declaration from Optum specifically with respect to "the type of data that PBMs retain" – which EPPs' argued was a basis for Judge DuBois's denying the motion to exclude Ms. Craft's prior opinions and Judge DuBois then cited in His Honor's memorandum opinion. *Id.*, at 16-17.

It was EPPs' and Ms. Crafts' clear choice to ignore the actual Optum data in the renewed motion and Ms. Craft's supplemental declaration in support of that motion. Similar to Ms. Craft's being the one who brought up the ASO/TPA issue at her deposition, Ms. Craft testified at her October 14, 2020 deposition that she herself decided to look at the Optum data (for the first time) in preparation for the deposition. Craft Oct. 14, 2020 Depo. Transcript, at 13:15-15:19 (". . . Q. Did you ask for those files? A. I did. Q. When? A. Sometime over the last several weeks in connection with thinking about the upcoming deposition. . . .") . Once again, that was weeks before Defendants filed their November 6, 2020 opposition to EPPs' renewed motion for class certification and Mr. Dietz's concurrent expert declaration. This too makes clear that it was no surprise to EPPs or Ms. Craft that Defendants and Mr. Dietz would discuss the Optum data.

* * *

We think it is inappropriate for EPPs and Ms. Craft to put in a reply report on these issues not just for the above reasons but also because the issue of a reply expert reports was explicitly raised at the August 11, 2020 scheduling conference, and Judge DuBois clearly stated that reply expert reports would not be permitted. *See* Transcript of Telephonic Scheduling Conference, Aug. 11, 2020, at 38:17-18, 39:8-13 (THE COURT: This is your reply . . . MR. SENATOR: . . . I assume with that there's no further expert reports, no rebuttal expert report or further evidence to be introduced at that stage. THE COURT: I don't think so. No on this

record that we're developing today."). His Honor's scheduling order then conspicuously omitted permission to file reply expert reports. See Order, Docket No. 716, Para 4.

This makes EPPs' and Ms. Crafts' clear choice not to address these issues in the renewed motion and Ms. Craft's supplemental declaration all the more stark, and the inappropriateness of addressing them for the first time on reply all the more clear. And the idea in your email that "As the moving party, [EPPs] bear the burden on this motion and believe a rebuttal report is warranted on this basis alone" has been disposed of by the Judge's statement at the August 11, 2020 scheduling conference. Transcript of Telephonic Scheduling Conference, Aug. 11, 2020, at 38:17-18, 39:8-13

We also strongly object to EPPs' waiting until two days before their reply brief is due to bring up this request. Mr. Dietz's expert report was served on November 6, 2020. The deposition was scheduled on a date EPPs' requested, and defendants asked no question of Dr. Dietz.

We believe that at this late date it is especially inappropriate for EPPs to seek to present a reply report. But if EPPs nevertheless chose to do so, we believe that the issue should be raised with Judge DuBois before any purported reply report, proposed reply report, or offer of proof of any sort in or with the reply brief – is presented. Any other course of action would in our view be directly contrary to Judge DuBois ruling at the status conference, and fundamentally unfair. (In light of the extremely compressed timing at this juncture, please include this letter with any presentation you make to Judge DuBois.) If you plan to move forward with seeking to present a reply expert report and will not follow this course, please tell us that immediately and we will present the issue to Judge DuBois tomorrow.

Very truly yours,

Stuart N. Senator

SNS:flr

EXHIBIT D

From: Justin Boley
To: Senator, Stuart
Subject: Re: Activity in Case 2:13-md-02460-JD IN RE: NIASPAN ANTITRUST LITIGATION Stipulation
Date: Thursday, December 17, 2020 1:15:36 PM

I think we should have a response for you very shortly.

Justin N. Boley
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> On Dec 17, 2020, at 3:02 PM, Senator, Stuart <Stuart.Senator@mto.com> wrote:
>
> Thanks. Where are EPPs on the reply report question you brought up about Ms. Craft?
>
> **Stuart N. Senator** | **Munger, Tolles & Olson LLP**
> 350 South Grand Avenue | Los Angeles, CA 90071
> Tel: 213.683.9528 | stuart.senator@mto.com | www.mto.com
>
>
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> ---
>
> **From:** Justin Boley <jnb@wexlerwallace.com>
> **Sent:** Thursday, December 17, 2020 12:57 PM
> **To:** Senator, Stuart <Stuart.Senator@mto.com>
> **Subject:** Re: Activity in Case 2:13-md-02460-JD IN RE: NIASPAN ANTITRUST LITIGATION Stipulation
>
> Stuart,
>
> I apologize, that's my fault. Given the limited scope of the stipulation and the time crunch, we didn't think it was necessary to circulate again. I'll ask that we send everything around in the future.
>
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>
> > On Dec 17, 2020, at 2:29 PM, Senator, Stuart <Stuart.Senator@mto.com> wrote:

Justin,

Did I miss the email where you ran this "stipulation" by defendants for approval? (I know we agreed to the bottom line requested relief.)

Stuart N. Senator | **Munger, Tolles & Olson LLP**
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From: ecf_paed@paed.uscourts.gov <ecf_paed@paed.uscourts.gov>
Sent: Thursday, December 17, 2020 11:45 AM
To: paedmail@paed.uscourts.gov
Subject: Activity in Case 2:13-md-02460-JD IN RE: NIASPAN ANTITRUST LITIGATION Stipulation

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Eastern District of Pennsylvania

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Case Number:	2:13-md-02460-JD
Filer:	PLAINTIFF(S)

Document Number: 730

Docket Text:
STIPULATION *Stipulation and Proposed Order regarding Page Limit Extension* by PLAINTIFF(S). (KODROFF, JEFFREY)

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